

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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:  
BENNET MARCUS, et al., :  
:  
Plaintiff, : 11-CV-2339 (SJ) (SMG)  
:  
March 18, 2013  
:  
V. : Brooklyn, New York  
:  
AXA ADVISORS, LLC, et al., :  
:  
Defendant. :  
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TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE  
BEFORE THE HONORABLE STEVEN M. GOLD  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES :

For the Plaintiff: LLOYD AMBINDER, ESQ.  
MICHAEL TOMPKINS, ESQ.  
KARA MILLER, ESQ.

For the Defendant: MICHAEL VON LOWENFELDT, ESQ.  
ADRIAN SAWYER, ESQ.

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1           THE COURT: Civil cause for discovery and status  
2 conference, Marcus, et al. v. AXA Advisors, LLC, 11-CV-2339.

3           For the plaintiffs?

4           MR. AMBINDER: Lloyd Ambinder, Virginia &  
5 Ambinder.

6           MS. MILLER: Kara Miller, also from Virginia &  
7 Ambinder.

8           THE COURT: Ms. Miller.

9           MR. TOMPKINS: Michael Tompkins from Leeds Brown  
10 Law.

11          THE COURT: Tompkins?

12          MR. TOMPKINS: Yes, sir.

13          THE COURT: Thank you. With a "p" in there?

14          MR. TOMPKINS: Yes.

15          MR. VON LOWENFELDT: Good afternoon, your Honor.  
16 Michael von Lowenfeldt from Kerr & Wagstaffe, for AXA.

17          MR. SAWYER: Good afternoon, your Honor. Adrian  
18 Sawyer, also from Kerr & Wagstaffe.

19          THE COURT: How are you?

20          MR. GERIBON: Good afternoon, your Honor. Michael  
21 Geribon. I'm in-house counsel for AXA.

22          THE COURT: Tell me your last name again.

23          MR. GERIBON: Geribon, G-e-r-i-b-o-n.

24          THE COURT: Thank you.

25          Before I drill down into the specifics raised in

1 your simultaneous March 8<sup>th</sup> letters, I'd like to get a little  
2 bit of lay of the land of the case again. One of the things  
3 that's confusing me a little bit is the notion that the  
4 plaintiffs have been, in some of the arguments to the Court  
5 as I recall them, grouping the plaintiffs into two separate  
6 categories. The defendants' letter to me groups them into  
7 six. And I'm trying to get a sense of whether those  
8 distinctions into six are really meaningful for purposes of  
9 the motion practice that's coming or whether it's reasonable  
10 to view them into two larger categories, despite the  
11 technical type of differences.

12 But having said that and creating the impression  
13 that I'm familiar with the details of the case, I don't  
14 remember what the two groups are or what the six groups are  
15 and how they're divided. So maybe I'll hear from the  
16 plaintiff first and get a little insight into that.

17 MR. AMBINDER: Would you like me to stand for  
18 this, your Honor?

19 THE COURT: No.

20 MR. AMBINDER: Generally speaking, there are two  
21 groups. We call them the pre-employment and the post-  
22 employment. I believe that's what the defendants refer to  
23 them as. The pre-employments are individuals who, for the  
24 most part, were not licensed and what your Honor I think can  
25 refer to as unpaid interns. They were individuals who were

1 hired, called independent contractors by the defendant, and  
2 for the most part did nothing more than cold calling for the  
3 company while they were studying to obtain their financial  
4 sales licenses in various disciplines.

5           Once they received the license, if they made the  
6 cut, they would then become post-employment, where for the  
7 most part, they would work solely on commission, for the  
8 most part.

9           THE COURT: That's the second group?

10          MR. AMBINDER: That's called the post-employment.

11          THE COURT: Right.

12          MR. AMBINDER: So for purposes of the motion,  
13 there were these 12<sup>th</sup> editions and 20<sup>th</sup> editions and 14<sup>th</sup>  
14 editions. They were individuals who were part of what's  
15 called a residential banking group, who were mostly outside  
16 salespeople, for the most part. We will not be seeking  
17 certification for the outside sales group. That won't be  
18 happening.

19               We'll definitely be seeking Rule 23 New York Labor  
20 Law certification for all pre-employments. So those  
21 individuals were not paid, didn't have a license, could not  
22 have derived a commission from their sales. And then we'll  
23 be seeking certification at this time for the 12<sup>th</sup> edition  
24 post-employment, who did obtain and receive commissions for  
25 actual sales but they were not paid a minimum wage for those

1 weeks where they did not receive -- they didn't make any  
2 sales or derive a commission.

3 The motion for class -- I'm not going to get ahead  
4 of myself. I know there are many subjects today. We see  
5 that as being a pretty standard, simple motion.

6 THE COURT: The 12<sup>th</sup> edition is post-employment.

7 MR. AMBINDER: 20<sup>th</sup>. I'm sorry, 20<sup>th</sup>.

8 THE COURT: 20<sup>th</sup>, okay.

9 MR. AMBINDER: I used the wrong number.

10 THE COURT: So as I recall it, there are three  
11 categories in each of the pre-employment and post-  
12 employment; there's 12<sup>th</sup> edition, 20<sup>th</sup> edition, and one of  
13 them has an RBG which I've just --

14 MR. AMBINDER: The 14<sup>th</sup> edition.

15 MS. MILLER: Do you mind if I --

16 MR. AMBINDER: Sure.

17 MS. MILLER: I'm sorry, Judge, just to expand a  
18 little bit. So there is a 12<sup>th</sup> edition group and a 20<sup>th</sup>  
19 edition group. A 14<sup>th</sup> edition group is another group but  
20 what happens is, after someone has been -- so there's the  
21 pre-employment, then they become a contract position, and  
22 they're either 12<sup>th</sup> or 20<sup>th</sup>. And then after usually about  
23 three years down the road, a contract is changed, so a 12<sup>th</sup>  
24 edition will become 14<sup>th</sup>, a 20<sup>th</sup> edition will become a 14<sup>th</sup>.  
25 So --

1 THE COURT: But the 14<sup>th</sup> group is not in our case.

2 MS. MILLER: Correct. It's just --

3 THE COURT: They may be 14's now but they were --  
4 only if they were 12's or 20's when -- during the class  
5 period would they -- okay.

6 MS. MILLER: Correct.

7 THE COURT: Now, which has the RBG variation, 12  
8 or 20?

9 MS. MILLER: It's the 12<sup>th</sup> edition.

10 THE COURT: Okay. So you're only seeking Rule 23  
11 certification with respect to all of the groups pre-  
12 employment and the 20<sup>th</sup> edition, which doesn't have the RBG  
13 variation post-employment.

14 MR. AMBINDER: In New York.

15 THE COURT: And you're only seeking it for New  
16 York employees.

17 Second question before I give Mr. Von Lowenfeldt  
18 an opportunity to explain his client's perspective on this:  
19 How large is the group that got the FLSA notice, how many of  
20 them responded? My sense is that the FLSA notice went  
21 nationwide. What portion went to New York and how many  
22 people in New York, if you know, fit the 4, 5, 6 but not the  
23 1, 2, 3 years and thus would be getting the class notice for  
24 the first time, never having gotten a 216(b) notice?

25 Did that question make sense?

1 MR. AMBINDER: That's a compound question there.  
2 Yes.

3 THE COURT: I'm sorry.

4 MR. AMBINDER: I'm going to have to work off of  
5 rough numbers, and I have no problem if counsel want to fill  
6 in the blanks with the numbers. I'm pretty sure roughly  
7 that the notice went out nationwide to about 5,000 people.

8 MR. TOMPKINS: That's about right.

9 MR. AMBINDER: And approximately, although some  
10 are in dispute, there are 700, give and take 15 either way,  
11 that have filed opt-in forms, let's call them, some of which  
12 are in dispute due to potential lateness.

13 THE COURT: Right.

14 MR. AMBINDER: The number of New York claimants, I  
15 think is 144. Don't hold me to that. And I couldn't begin  
16 to tell you how many people worked in the three additional  
17 years under New York law because I just don't know how many.  
18 An educated guess: Double the 144, probably more, because  
19 these are people who opted in and the rest would be putative  
20 class members. I would imagine it's a few hundred but I'm  
21 not sure what the number is for New York.

22 THE COURT: But in -- I guess I thought the number  
23 might be smaller because I assumed that -- but what I don't  
24 know is whether you could be in the circumstance where you'd  
25 be entitled to be a 216(b) plaintiff after spending three

1 years as a class rep, so that we've already captured a bunch  
2 of these people with the 216(b) notice, or whether your  
3 evolution from the system is short enough that by the time  
4 you would be -- by the time you're -- if you qualify for  
5 years 4, 5, 6 -- you're looking at me very patiently. I  
6 appreciate it. If you qualify for years 4, 5, 6 under New  
7 York Labor Law, you've already aged or employed out of the  
8 group by the time you're a 216(b), so we haven't captured  
9 that group. That's what I was actually thinking about.

10 Does that question make sense, even if the answer  
11 is elusive?

12 THE COURT: I guess not.

13 MR. AMBINDER: I apologize.

14 MR. TOMPKINS: It makes sense to me. I can  
15 address that one.

16 MR. AMBINDER: Go ahead, let Mike address it.

17 THE COURT: Fine.

18 MR. TOMPKINS: Your Honor, it does get confusing  
19 with the numbers. Let me answer that last question first.  
20 Our calculations are about 5% of the New York potential  
21 group have opted in. So the 144 people represents about 5%  
22 of the potential New York class. I have not done the  
23 analysis that you've asked, as to what percentage got the  
24 notice versus who have never gotten the notice. But you can  
25 only be an employee agent for three years, so what you're

1 saying makes logical sense. And I suspect that a large  
2 number of the people in the back years either did not move  
3 through the program and so dropped out entirely or converted  
4 to 14<sup>th</sup> edition independent contractor status and, therefore,  
5 didn't get the 216(b) notice for that reason.

6 And the 144 is not -- I haven't done the analysis  
7 of the percentage.

8 MR. AMBINDER: I could be wrong.

9 MR. TOMPKINS: No, 144 I believe is who's opted  
10 in.

11 MR. AMBINDER: Yeah.

12 MR. TOMPKINS: I don't know what number of people  
13 in New York specifically got the FLSA notice in the first  
14 place.

15 MR. AMBINDER: We may have that back at the office  
16 but I'm not sure.

17 THE COURT: Well, I'm only -- the fine graining of  
18 this is not really relevant. What I was trying to figure  
19 out is whether the timing of the class notice and the  
20 significance of the class litigation was of a substantial  
21 magnitude. If the status was static, one would assume that  
22 most of the putative class members would have gotten the  
23 216(b) notice and the ones -- and would have had an  
24 opportunity to opt in. And whatever we decide on Rule 23  
25 might be more of a technical lawyer's detail than one of

1 substantive significance. But given the short-term status  
2 in the groups we're talking about, it probably has greater  
3 significance than that.

4 MR. TOMPKINS: The putative class is substantially  
5 larger than the nationwide opt-ins.

6 THE COURT: Okay. Thank you very much for helping  
7 me reach that. Maybe if I had asked my question more  
8 directly in the beginning, I could have spared you some  
9 effort.

10 MR. AMBINDER: I think that it's for the potential  
11 23 definition. Counsel may elaborate, I guess.

12 MR. VON LOWENFELDT: So the groups do matter; it's  
13 not two groups. Let me try to explain how the system works.  
14 The actual agency program has two components: There's the  
15 employment period, which AXA internally the DSF or  
16 developing sales force period, and then the 14<sup>th</sup> edition  
17 agents are referred to internally as the ESF experienced  
18 sales force agents.

19 So basically, you come in for three years, up to  
20 three years as an employee, and you either make it and move  
21 on to being an independent contractor like most of the  
22 industry or you go do something else. Before you become a  
23 DSF agent, whether that's a 12<sup>th</sup> or 20<sup>th</sup> edition agent --

24 THE COURT: Just remind me what DSF stands for.

25 MR. VON LOWENFELDT: Sorry, employee. Let me just

1 use the word employee.

2 THE COURT: Okay.

3 MR. VON LOWENFELDT: Before you become an employee  
4 agent -- and there are different kinds of employee agents.  
5 But before you become an employee agent, you go through what  
6 AXA looks at as an extended audition period that we call the  
7 pre-contract period, and that really has two phases.

8 THE COURT: That's what they called the unpaid  
9 internship period.

10 MR. VON LOWENFELDT: That's what they call the  
11 internship. There's really two phases to that: There's the  
12 pre-contract period when you have no license. And from our  
13 perspective, you're not doing any work for AXA. All you're  
14 doing is getting your license. You might be coming to the  
15 AXA office to observe other people, so you get a sense of  
16 what the job is about, but you're not performing any work  
17 for AXA because you're not licensed.

18 And then once you get your license, you have to  
19 sell a couple of policies before they will make you an  
20 employee. We think of it as an audition for both sides  
21 because the fact is, three years is not a lot of time to  
22 then be out on your own as an independent contractor, and a  
23 lot of people wash out of this industry, industry-wide. So  
24 the idea of this pre-contract program is to make sure both  
25 sides know what they're getting into before they go down

1 that road.

2           So there's a huge difference between pre-contract  
3 before you get your license and pre-contract after you get  
4 your license, in terms of what you're doing. And then once  
5 you're an employee, there's a huge difference from when you  
6 were pre-contract.

7           There's another big difference: The other big  
8 difference is the RBG group, which actually I believe is  
9 retirement benefits group -- it has nothing to do with  
10 banking -- and the so-called traditional agents. The RBG  
11 agents' job is to work out of schools and hospitals and  
12 other places where the employer pays for the retirement  
13 benefits, and then they sign people up. So they spend 90-  
14 plus percent of their time outside, nowhere near an AXA  
15 office.

16           It's good to hear that the plaintiffs don't want  
17 to seek certification of that group. I'm getting that for  
18 the first time today. I would note that one of their three  
19 named plaintiffs is an RBG agent. Mr. Kennedy was an RBG  
20 agent, so I don't know where that leaves him or the RBG  
21 agents who've opted in under FLSA, because we do have a  
22 number of RBG agents who opted in --

23           THE COURT: Well, he said he wasn't seeking  
24 certification under 23. That doesn't mean he's not seeking  
25 to press their claims under FLSA.

1 MR. AMBINDER: Precisely, because we don't -- I  
2 can represent that he was a 14<sup>th</sup> edition and he was working  
3 more than half of his time out of the office. He's not  
4 going to be able to be representative of the class that we  
5 seek to have certified, but it doesn't negate the fact that  
6 the other two can represent that potential class.

7 THE COURT: Yeah.

8 MR. VON LOWENFELDT: My point is, it sounds like  
9 RBG is still in the case but maybe as a smaller piece.

10 THE COURT: Well, only as an FLSA piece, not  
11 relevant to the class certification motion. In fact, I --  
12 please forgive me if it sounds argumentative. I don't mean  
13 it that way. I'm still at the learning, not deciding phase  
14 here. But the way I heard you describe this, frankly, is  
15 consistent with a bifocalled analysis, in that what you're  
16 saying, I think, is that all of the pre-employment, their  
17 unpaid intern category, are really similarly situated for  
18 Rule 23 analysis.

19 I don't mean similarly situated in that they are  
20 sufficient -- share sufficient commonality to warrant  
21 certification. I mean that regardless of whether you're a  
22 12 or a 20 or an RBG, you're not getting paid, you're not  
23 working for us. And whether you're inside or outside, it  
24 doesn't matter, you're not an employee.

25 With respect to the post-employment category,

1 they're only looking to get one slice of that, so that two  
2 out of the three post-employment categories that were the  
3 subject of your letter are off the Rule 23 table. Clearly,  
4 we don't need questionnaires and depositions of two out of  
5 the six groups that you identified in your letter if they're  
6 not going to be the subject of the class certification  
7 motion.

8 MR. VON LOWENFELDT: I think -- a couple of things  
9 about that. As I draw the grid, if I ignore the contracts,  
10 I usually draw a four-part grid, because I think RBG is  
11 different pre-contract and post-contract, to some extent. I  
12 think what you're planning to do after the audition is  
13 important to how you act during the audition period. So I  
14 don't see the pre-contract people as a unitary group. I see  
15 them as an RBG pre-contract and non-RBG pre-contract.

16 I would agree with your Honor that the minor  
17 distinctions of the 12<sup>th</sup> and 20<sup>th</sup> edition contract are --  
18 they're not irrelevant but they're less significant  
19 distinctions than the RBG/non-RBG distinction. So I have  
20 always thought of this as at least four if not six  
21 categories. If they've lopped off one of the two employment  
22 categories, in my mind, that leaves us with three  
23 categories --

24 THE COURT: Three, all right.

25 MR. VON LOWENFELDT: -- not two.

1           In terms of who discovery should go to, I guess it  
2 depends on what discovery is for. If we are not going to  
3 proceed towards an FLSA decertification motion at this time  
4 and you are not determining what merits discovery we get on  
5 the FLSA claims at this time, and they're not seeking to  
6 certify a group, then I would be forced to agree that  
7 discovery as to that group is not relevant.

8           It's our position that the most efficient thing to  
9 do -- interestingly, I was looking, in preparation for the  
10 hearing, at the cases they provided the Court. And Exhibit  
11 B, which is the Baras (ph) case -- the schedule was  
12 consistent more or less with what we're saying. They dealt  
13 with FLSA decertification and Rule 23 certification at the  
14 same time. If we were to do that, then we would need, in  
15 our mind, full discovery as to the FLSA group.

16           THE COURT: Yeah.

17           MR. VON LOWENFELDT: If we're just going to do a  
18 motion on New York and kick everything else down the road,  
19 then I think we're in a little bit of a different position,  
20 because then we have 144 opt-ins from New York. I don't  
21 know how many of them are RBG. I don't have that in my  
22 head. But it is certainly a -- everyone else we deal with  
23 later. I don't know that that's the most efficient thing to  
24 do but there's a logic to that.

25           THE COURT: Thank you. I appreciate that. It

1 helps me understand the dilemma more clearly. I had lost  
2 track of your cross-motion.

3 What do you think about whether these should be  
4 litigated together or separately?

5 MR. AMBINDER: Well, it doesn't really make a  
6 difference to us whether they are "litigated" together or  
7 separately, your Honor. I think what's more important is  
8 that when you're dealing with the elements of Rule 23 or New  
9 York 901 --

10 THE COURT: Could you just pull that microphone a  
11 little closer to you?

12 MR. AMBINDER: Whether you deal on parallel tracks  
13 or not, I think the more substantive issue before the Court  
14 right now is, should someone who files an FLSA opt-in be  
15 subject to Rule 23 discovery through our named plaintiffs?  
16 We will be filing our motion for class certification in the  
17 next three days. It's ready to go.

18 And we don't see the need for the defendants to be  
19 able to take -- A) to delay the case, and B) to take  
20 discovery from opt-ins on the issues of whether or not a  
21 class can be certified and whether or not the named  
22 plaintiffs can represent those of the putative class. We  
23 see there being complete distinctions between the two. It  
24 has nothing to do with the merits of their claim and it  
25 doesn't go to issues of damages.

1           If this was being brought solely in New York, the  
2   two named plaintiffs or three named plaintiffs would be  
3   subject to discovery and a motion would be brought, and the  
4   defendants of course would be subject to pre-class  
5   certification discovery. So we didn't come here expecting  
6   that the FLSA opt-ins who worked in New York should be  
7   subject to discovery with respect to the issue of what's  
8   under Rule 23.

9           Do you see the distinction? You don't.

10          THE COURT: No. I mean, I understand the words  
11   you're saying, but I guess I've been under the impression  
12   that the defendants wanted this discovery both to  
13   demonstrate a lack of commonality sufficient to sustain the  
14   216(b) certification post-discovery, but also to be able to  
15   say that yeah, if the plaintiffs cherry-picked two guys out  
16   of 700 New York employees in the category, they can show  
17   that those two were inside and outside the same amount of  
18   time, they can show that they had certain work  
19   responsibilities.

20          But if we -- whether they opted into the FLSA  
21   216(b) or not, we need to look at 50 or 100 of these people  
22   to show you how many different scenarios subject to  
23   different legal analyses there are to show that individual  
24   questions predominate here and not common ones. That's what  
25   I understood the argument to be.

1 MR. VON LOWENFELDT: That's absolutely right. And  
2 if there are 144 people who aren't just absent class members  
3 but they've affirmatively chosen to participate in this  
4 lawsuit, and that's only one in twenty of the potential  
5 class members, we strongly feel like we should get to take  
6 at least a questionnaire as to every single one of them and  
7 a deposition of a large number of them exactly to deal with  
8 this cherry-picking problem. That's the putative class.

9 I must say I'm a little taken aback by this two  
10 days thing, because they're the ones who proposed in January  
11 that their motion be filed on May 31<sup>st</sup>. That was their idea  
12 in their letter to the Court. We're getting along great  
13 with counsel. I don't want to make this sound personal.  
14 But it's surprising to us to be accused of delay for  
15 suggesting a date that they suggested.

16 If you go back a year ago, in July, there was a  
17 joint -- before I got involved in the case but I can read.  
18 There's a joint case management order that the parties  
19 submitted, which proposed a lengthy discovery period after  
20 what we're doing now, which is have the class -- if you  
21 look, your Honor, at -- later I'm sure, at docket number 45,  
22 which is the joint order we submitted last year, the  
23 proposal was close the opt-in period, meet and confer about  
24 what to do, take discovery and then have class certification  
25 proceedings. That's what we thought we were doing. So we

1 haven't been sitting on our hands for seven months. We've  
2 been doing exactly what the order suggested.

3           There was an agreement made in January that we  
4 would do the named plaintiffs' depositions by the end of  
5 April, I think April 23<sup>rd</sup> or something. So to -- I mean, you  
6 can obviously file your motion whenever you want to file  
7 your motion, but I'm going to want a long time to respond to  
8 that motion because I haven't begun to do the discovery that  
9 we need to make sure that that class motion is looked at  
10 with the rigorous analysis that the law requires, involving  
11 the rights of thousands of people who did not affirmatively  
12 choose to participate in this lawsuit.

13           THE COURT: Well, the only response I have to you  
14 that I must say crossed my mind when I read your letter is  
15 this: Whatever the -- I assume that they will not be heard  
16 to put in an affidavit from anyone that they haven't  
17 provided discovery about. And if they on their Rule 23  
18 motion say, you get discovery of these two plaintiffs  
19 because they're our named class reps and they're the only  
20 ones whose affidavits are going in, I think you have a wide  
21 open opportunity to challenge their claims about class  
22 certification based upon a record that you create instead of  
23 the putative class members.

24           This is not information that is uniquely in the  
25 hands of the plaintiffs, I presume. I presume the

1 defendants have people working for them who monitored,  
2 oversaw, regulated this process. If they put in affidavits  
3 about what the other 850 members of the putative class, a  
4 number I'm making up right now, did and why they're  
5 different, and they haven't exposed their putative class  
6 members to discovery, I suppose that's the record that the  
7 Court will have before it when it decides the motion. Why  
8 isn't that not advantageous to you rather than hurtful?

9 MR. VON LOWENFELDT: It might be. You know, this  
10 is the chess versus poker dilemma; do I want perfect  
11 information or imperfect information?

12 THE COURT: Yeah.

13 MR. VON LOWENFELDT: It may be that that ends up  
14 being advantageous to me if you deny the relief that we seek  
15 and they move in three days with just a handful of people.  
16 Certainly, I would still need months to get ready but that  
17 would make some sense.

18 On the other hand, it may be that there's very  
19 good -- the person who's going to know best what each agent  
20 did is that agent. So there will be some knowledge from  
21 managers about what the people were doing, and I'm sure we  
22 will have those declarations. But fundamentally, only an  
23 agent knows what the agent is doing on a day-to-day basis in  
24 their home. That's our whole case here is that these are  
25 not supervised people; each one of them is going to be

1 acting differently.

2 I think that, although I would hope to persuade  
3 the Court with manager declarations, that I could do a more  
4 persuasive job if I had a set of comprehensive discovery  
5 responses written in a non-argumentative, non-overly-  
6 lawyered way, so we got actual human being responses, not a  
7 big pile of junk that we can't use, that were quantifiable  
8 and could be subject to analysis.

9 What we did when we drafted the questionnaire is  
10 we tried to think about, what are the relevant questions in  
11 the case and how would I ask that question if I was just  
12 sitting in a coffee shop asking someone in a form -- you  
13 know, when you go to the doctor and they ask you, do you  
14 have this, do you have that, and you have these long kind of  
15 check-off forms.

16 That was the model we were thinking through, with  
17 the idea being that the burden for any individuals is  
18 insignificant, and we're going to get good data, real data  
19 from them. Obviously, we'll also have managers, that's  
20 right. But I think I'm allowed to have a little bit more  
21 information than just the managers.

22 The other problem is, with truly absent class  
23 members, we're in a little bit of a gray area, but I think I  
24 can still contact them. The law, as you know, is always  
25 moving on that point. I can't contact the FLSA opt-ins;

1 they're clearly their clients.

2 THE COURT: I'm glad you said that because you may  
3 know I had a case where that's exactly what happened.

4 MR. VON LOWENFELDT: I didn't know that but it's -  
5 - but no --

6 THE COURT: But I understand that you're aware.

7 MR. VON LOWENFELDT: So being aware of that, it  
8 necessarily limits us to some extent.

9 THE COURT: Right.

10 MR. VON LOWENFELDT: I will note that at the FLSA  
11 stage, they introduced evidence by declaration from people  
12 other than the named plaintiffs. I would assume that the  
13 same thing will happen again, and I don't know what will  
14 happen in conjunction with the reply brief.

15 If this Court were to say they're not allowed to  
16 present any evidence that wasn't in their opening briefs and  
17 we can go and do whatever we can and give us a bunch of time  
18 to do that, I could probably make that happen without  
19 talking to the opt-ins. But that's not to say that I don't  
20 think the opt-ins are relevant people who should be -- have  
21 some discovery taken from them. And I don't think what  
22 we're proposing is in any way burdensome vis à vis any  
23 specific person.

24 THE COURT: Hold your fire for one more question,  
25 if you will. What is the legal defense -- I guess I don't

1 really understand what the legal defense to the -- I  
2 understand the outside salesperson exemption for people who  
3 can earn commissions. I say I understand it. I know enough  
4 about it to have this discussion. I don't understand what  
5 the audition defense depends on.

6 MR. VON LOWENFELDT: In the pre-license period,  
7 which is the bulk of the audition time, when they're  
8 studying for their license, they're not doing any work. The  
9 idea that they're cold calling is just not true. If someone  
10 was cold calling in the one branch where they have  
11 witnesses, then we have a one-branch problem, but it's not a  
12 program where they're supposed to be cold calling. They're  
13 not licensed, they can't sell. So our position is, most of  
14 those people, what they're doing does not constitute work.

15 THE COURT: What is your position as to what they  
16 are doing? In other words, if it's not work, what is it?

17 MR. VON LOWENFELDT: So to get your licenses, you  
18 have to be affiliated with a company. So they're basically  
19 borrowing AXA's name in order to take the tests and get the  
20 licenses while they figure out whether they want to sign on  
21 with us and we figure out whether we want to sign on with  
22 them. That's basically what they're doing.

23 THE COURT: They have no -- your point is, they  
24 don't have to show up --

25 MR. VON LOWENFELDT: They can have other jobs.

1 They have no exclusivity. They don't owe any obligations to  
2 us. They can stop any time they want. We're not paying for  
3 anything for them. It's an affiliation that's aimed towards  
4 reaching an employment relationship but it is not --

5           So technically -- the technical argument is that  
6 they're independent contractors, because we don't control  
7 the means and manner by which they do basically anything.  
8 The only controls about anything are legal controls that  
9 relate to compliance, things like they can't sell without a  
10 license.

11           Then you have this tiny sliver of time after they  
12 get their license where they're acting as independent  
13 contractor salespeople, to show that they can sell. There,  
14 the means and manner is not being controlled. Again, they  
15 don't have schedules.

16           Now, as I said, they may want to come in and show  
17 what I refer to as an under-performing subclass or a manager  
18 who was twisting down too much on these people. That's not  
19 going to speak to the state as a whole, that's not going to  
20 speak to thousands of people.

21           The program as designed is not designed to  
22 generate work for AXA from the pre-contract people until  
23 they get their license. And after that, it's a very short  
24 independent contractor period, where just like the rest of  
25 the industry uses independent contractors, we don't control

1 their means and manner, we don't control their timing, and  
2 they just -- they can do that in a day or several months.  
3 There's a time limit because at some<sup>4</sup> point, you run out of  
4 program.

5 THE COURT: What's the educational requirement to  
6 even become an auditioner?

7 MR. VON LOWENFELDT: They're --

8 THE COURT: Are they all college graduates?

9 MR. AMBINDER: Most of them are -- what makes it  
10 particular bad is that -- your Honor doesn't recall perhaps  
11 the oral argument on the 216(b), but all of this was brought  
12 up. And the point is that (ui) couldn't close the deal.  
13 They had to call (ui) salesperson to do that. But they were  
14 required to be in the office at 8:00 and they were required  
15 to work on Saturdays. These are facts --

16 THE COURT: Right.

17 MR. AMBINDER: -- the issue of the case. The  
18 whole thing of, we were just doing you a favor is just not  
19 true. Workers have told us they had to buy the proprietary  
20 Dell laptop, they had to buy the proprietary software to  
21 learn. It wasn't just about getting a license.

22 But I don't want to get into the facts because now  
23 we're going to start arguing merits of the case. Suffice to  
24 say, your Honor -- and I have the transcript -- throughout  
25 the oral argument kept asking defendants' prior counsel,

1 they worked for you and you didn't pay them. And we didn't  
2 call them interns. You called them interns, actually, in  
3 the transcript. They were just unpaid employees and that's  
4 all this really comes down to.

5 THE COURT: Right. Well, I don't want to deal  
6 with the merits but now I have a better sense of the factual  
7 dispute. The reason I'm asking about the education level is  
8 because I looked at that questionnaire and it's challenging  
9 for someone to kind of get their arms around it. But if  
10 these are college graduates on their way to getting  
11 broker/dealer licenses --

12 MR. AMBINDER: That's what we're talking about,  
13 Judge. Look, respectfully --

14 THE COURT: I never feel anything but respect  
15 toward or from you, Mr. Ambinder, I assure you.

16 MR. AMBINDER: At the end of the day, I'm not sure  
17 where the Court is going with this. If you said to me,  
18 look, Mr. Ambinder, if you want to put in some (ui)  
19 declarations or affidavits from putative class members who  
20 are affected under New York law prior to the three year  
21 look-back and if you do that, they're going to be subject to  
22 discovery, I hear you on that. That is not an uncommon  
23 directive by a court on a motion for class certification.

24 But if the Court is going in the direction of an  
25 FLSA opt-in has to now fill out a nine-page, 130-question

1 questionnaire as part of the Rule 23 motion for class  
2 certification --

3 THE COURT: No, no, the question is whether the  
4 decert -- that's why I think the first question we have to  
5 answer is whether we're untangling the Rule 23 in the  
6 decertification cross-motion or whether we're keeping them  
7 as one set of motion papers.

8 MR. VON LOWENFELDT: Your Honor, we do think --  
9 I'm sorry, Mr. Ambinder. We do believe that on the Rule 23  
10 motion, the people who by coincidence are opt-ins -- I  
11 understand I can't send an interrogatory to an absent class  
12 member, but an opt-in is a party in the case. They're not  
13 excluded from the New York class.

14 THE COURT: I get that. I mean, you're entitled  
15 to some discovery in aid of your motion, but I don't think  
16 it's coincident with the -- I don't think that there's a  
17 rigid principle that says when you're going to have  
18 certification motion practice under Rule 23, that every  
19 216(b) opt-in is subjecting themselves as a result to  
20 discovery on the Rule 23 motion.

21 You're making the argument that that's a useful  
22 group to take discovery from. Mr. Ambinder says no. We can  
23 debate that. But I certainly don't subscribe to the idea  
24 that there's a per se rule that once you file a 216(b) opt-  
25 in, then you become the subject of interrogatories and

1 depositions in the Rule 23 class certification motion.

2           What I am more concerned about is this decision --  
3 the scope of discovery on the decertification motion,  
4 though, is more coincident with the scope of the opt-ins,  
5 even if we do sampling. Then there's a real tie-in between  
6 the fact that you opted in and the fact that there's a  
7 decert motion. That's different from the fact that because  
8 you opted in, you happen to be available for Rule 23  
9 discovery.

10           MR. AMBINDER: I hear you. In New York -- I don't  
11 know from California. I just know New York just dealt with  
12 this recently on a case (ui).

13           THE COURT: Okay.

14           MR. AMBINDER: The standard for decertification  
15 for an FLSA is different than the standard for certification  
16 under 23. They're completely different standards. That's  
17 issue one. We believe that the 23 should just go forward.  
18 We should move the case along and not wait until the end of  
19 the year to start first getting involved in the decert  
20 motion and the cert motion. We would just prefer to move  
21 along quickly with the 23.

22           I would understand if you said, if you couldn't  
23 get me supporting affidavits, expect to produce them for a  
24 deposition. Okay, I think that's fair. I mean, they should  
25 have a right to do that. But right now, they were jumping

1 in too many places at once, and I don't think we should.

2 With respect to the -- if you want to jump over  
3 now to the actual questionnaire itself --

4 THE COURT: We'll get there.

5 MR. AMBINDER: All right, then we'll stay away  
6 from that, but that's where I would like --

7 THE COURT: Just because we've got a lot -- I  
8 agree with you, maybe I put too many balls in the air at the  
9 same time.

10 MR. AMBINDER: I would agree then --

11 THE COURT: It's your -- it's plaintiffs' case.  
12 I'm a little concerned about the two motions coming together  
13 for a reason I haven't articulated, which is that given that  
14 this is not a consent case, my understanding is that the  
15 question of 216(b) is appropriately decided by a magistrate  
16 judge, but the question of Rule 23 is not. So unless you're  
17 going to consent to have the magistrate judge decide the  
18 Rule 23 issues, you could end up with pieces of the case in  
19 front of two different judges.

20 I also think that, you know, we at least  
21 theoretically toll the Rule 23 claims while the putative  
22 complaint is pending, on the theory that these people might  
23 otherwise file timely claims. They're counting on the Rule  
24 23 case and seeing how it develops. If there comes a time  
25 when they lose their Rule 23 motion, those plaintiffs are

1 entitled to pursue their individual actions while people  
2 still remember and have records that relate to them. So I'm  
3 eager to get the Rule 23 practice, too. So those are good  
4 reasons to delink it from the decert motion, I think. Okay.  
5 And maybe the Rule 23 practice will inform us.

6           So let's go through these discovery -- and also,  
7 the Supreme Court has recently -- I can't remember the case,  
8 now that I've opened my mouth, but they've -- I guess it was  
9 the materiality case in the securities fraud context talked  
10 about the importance of moving Rule 23 practice as forward  
11 as possible and not getting bogged down in the merits of the  
12 legal case while you do it.

13           MR. VON LOWENFELDT: We'll see what they tell us  
14 in Comcast and whether it's consistent with the materiality  
15 case that seems to be a lot of this lately.

16           THE COURT: Well, you get that from the entire  
17 bench, don't you?

18           So let's go through these letters and see what we  
19 can decide now about going forward, in light of this  
20 decision to untangle the Rule 23 and the FLSA decert. I'm  
21 going to put the two letters in front of me and maybe we can  
22 talk about them one at a time. I'm sorry if I made us a  
23 little bit later in the afternoon, in light of the fact that  
24 I have all this background.

25           I continue to feel that this questionnaire -- my

1 take on the questionnaire is that it's asking the same  
2 questions in two different ways. There are some narrative  
3 questions that say, what did you do, where did you do it and  
4 how long did you spend, and then there's, fill out this  
5 grid.

6 And I understand that you've like to have some  
7 kind of mathematician come in and break out the hours, but I  
8 think that you're really asking the plaintiffs to do your  
9 job of ferreting out the inferences from the facts that  
10 they're articulating. In fact, at the bottom of page 4 of  
11 your letter -- I'm addressing myself without saying so to  
12 Mr. Von Lowenfeldt, whose name I just pronounced, right,  
13 Lowenfeldt?

14 MR. VON LOWENFELDT: Von Lowenfeldt, yes, your  
15 Honor.

16 THE COURT: Von Lowenfeldt. You said, all we're  
17 really asking, Judge, you tell me in the bottom paragraph of  
18 page 4, is tell us each activity you performed, where you  
19 performed it and how long it took.

20 And my inclination, given the nature of the folks  
21 we're talking to, some of whom may have kind of an  
22 engineering/mathematical bent and some of whom may not --  
23 you probably have English majors and physics majors who want  
24 that Wall Street money -- my instinct is to give them the  
25 option of either filling out the grid or filling out the

1 written responses, because they seem redundant to me. What  
2 am I missing there?

3 MR. VON LOWENFELDT: Some of the written questions  
4 do not ask what they did; it asks what instructions they  
5 were given.

6 THE COURT: Okay.

7 MR. VON LOWENFELDT: What instructions you were  
8 given is not the same thing at all with --

9 THE COURT: Fair enough.

10 MR. VON LOWENFELDT: So question 1 and 2 and 3 are  
11 clearly not duplicative of the grid at all. I can see your  
12 argument on question 4. I was trying to be a little more  
13 subtle, inside/outside the office, to get more  
14 particularized statements (ui) whatever. We don't need  
15 that, I guess.

16 With question 5, how often did you come to the  
17 office, if they tell me they were in the office four hours a  
18 day, I don't know if that's four times or one time a week.  
19 So I don't think that's a duplicative question, I think  
20 that's a separate question.

21 THE COURT: I'm sorry, how many -- how many times  
22 a week did you come to the office?

23 MR. VON LOWENFELDT: Right. I can see the  
24 argument on 6, although there's not a grid question for  
25 calls but we could add one.

1 THE COURT: No, I don't want to do that.

2 MR. VON LOWENFELDT: But there's no grid question  
3 on calls, so then how is 6 duplicative because there's no  
4 question about calls.

5 THE COURT: You're right.

6 MR. VON LOWENFELDT: And I could go through this  
7 but I did -- we did attempt to ask different questions.  
8 What we're not trying to do is trap people with inconsistent  
9 answers. What we're trying to do is take the major  
10 activities that people did perform in terms of categories  
11 and present them in a grid so they can work their week  
12 together, and then ask questions to fill in the gaps that we  
13 had suspected that process would result in.

14 And certainly I'm happy to discuss with  
15 plaintiffs' counsel or -- I don't know that we have to take  
16 up the Court's time erasing some of these questions or  
17 rewording them to eliminate duplication, but that was the  
18 goal. And the goal of the grids is to ask what they're  
19 doing and split it up between the various places that we  
20 think are important in time: Before your license, after  
21 your license, when you were an employee, which we would  
22 expect different activities in the different time periods.

23 THE COURT: First of all, there is a cold calling  
24 entry on the grid.

25 MR. VON LOWENFELDT: Not in the pre-contract

1 period. Question 6 is directed to the pre-license/pre-  
2 contract period.

3 THE COURT: Okay.

4 MR. VON LOWENFELDT: And there is --

5 THE COURT: So on chart B --

6 MR. VON LOWENFELDT: Chart B is the post-license.

7 THE COURT: And chart C is post-license.

8 MR. VON LOWENFELDT: Chart C is the employee  
9 period, yes, your Honor.

10 THE COURT: Okay.

11 MR. VON LOWENFELDT: That's why. And if you'll  
12 note, actually, when we look at the post-licensing  
13 questions, which are 14 through 22, there's not a cold  
14 calling question there because it's on the chart. So we  
15 were trying very carefully -- and I do not pretend to be  
16 perfect. There may be duplication here, but we were trying  
17 to avoid duplication.

18 THE COURT: Would this be simpler if instead of  
19 having to check the box, you could fill in the number of  
20 hours? I don't know why but this -- is it the Y axis with  
21 these different ranges? It's confusing to me.

22 MR. VON LOWENFELDT: What I would suggest, your  
23 Honor, rather than spend the next twenty minutes discussing  
24 those kind of things -- if your Honor agrees with us that a  
25 questionnaire of some sense is appropriate and that we're

1 not asking hundreds of questions here --

2 THE COURT: I'm not worried about the number of  
3 questions.

4 MR. VON LOWENFELDT: -- I think that plaintiffs'  
5 counsel and we could work out formatting questions and  
6 what's easiest to fill out and what makes the most sense --

7 THE COURT: Okay, good.

8 MR. VON LOWENFELDT: -- to gather the type of  
9 information we're seeking here. We have not yet attempted  
10 that because there's a gulf between the parties on whether  
11 this level of detail is appropriate in the first place. But  
12 if you agree that it's appropriate but the format is not the  
13 best, I am sure that it's better for us to try and work it  
14 out.

15 THE COURT: Okay.

16 Mr. Ambinder, do you want to get another word in  
17 before I decide?

18 MR. AMBINDER: I'm going to give you a quick word.  
19 At the end of the day or at the beginning, we were not  
20 averse to the issue of using a questionnaire. We were  
21 willing to use one. It's just that we think this is way too  
22 dense. Our letter speaks for itself. I'm more than happy  
23 to meet and confer to come up with something. My fear is  
24 that it's the substance of the questionnaire -- if you ask  
25 questions that you only want to get answers to and you fail

1 to put in other --

2 THE COURT: You can add some questions if you  
3 like.

4 MR. AMBINDER: Of course. So we're prepared to  
5 meet and confer.

6 THE COURT: Yeah. I mean, the graphic spread --  
7 what I don't want to have happen -- here's the fear that  
8 crossed my mind. I'm not trying to be indirect. Sometimes  
9 you just get into the trees and you forget the forest. What  
10 I don't want to have happen is somebody get one of these,  
11 their eyes glaze over, they don't put it in, and you say  
12 dismiss their FLSA claim for failure to cooperate in  
13 discovery. That's the fear, and this is an overwhelming  
14 looking questionnaire, even if substantively, it's not that  
15 overwhelming.

16 MR. VON LOWENFELDT: I think, your Honor, if we  
17 remove the graphic and do it differently, the questionnaire  
18 gets a little longer because it takes more space to ask the  
19 question in a different format. The graphic was actually --  
20 our intention was to shrink the size of the document --

21 THE COURT: Yeah.

22 MR. VON LOWENFELDT: -- in terms of number of  
23 pages. But if that is not as much of a concern, I am  
24 positive that the creative minds on both sides --

25 THE COURT: Okay.

1 MR. VON LOWENFELDT: -- can work out a way to ask  
2 these type -- this level of detail questions without  
3 confusing or overwhelming anybody. We certainly are not  
4 attempting to -- it doesn't do me any good on the  
5 decertification motion if I come in and say, well, we sent  
6 this to 144 people in New York, your Honor, and none of them  
7 filled it out, so dismiss them. Now I don't have any of the  
8 evidence I was trying to use to argue either decert with  
9 respect to everybody else or --

10 THE COURT: Or in opposition to 23.

11 MR. VON LOWENFELDT: Correct.

12 THE COURT: Okay. Well, I will give you a chance  
13 to redo the questionnaire. I'm not concerned about the  
14 number of questions in a case of this complexity and  
15 magnitude. I'm just not, nor do I think that this is  
16 overbearing. I do think that the physical layout is a  
17 little intimidating and I don't want anybody chilled from  
18 filling it out because it looks so hard to complete. You  
19 know, it reminds you of those class action notices you get  
20 on tissue paper that are fifty pages long and very fine  
21 print. Nobody wants to sit down and deal with it.

22 MR. AMBINDER: Let's see what we can do.

23 THE COURT: So now let's talk about numbers, okay?  
24 We've got a class of New York plaintiffs that fall into, at  
25 most, three categories, right?

1 MR. VON LOWENFELDT: Right.

2 THE COURT: We don't need a huge universe to draw  
3 inferences, assuming -- what I don't want to have happen,  
4 Mr. Ambinder, is we whittle down the number that the  
5 plaintiff gets to take -- excuse me. We whittle down the  
6 number that respond and then you make an argument that  
7 that's not statistically significant or lacks relevance  
8 because the number is so small. You can't have it both  
9 ways, obviously.

10 MR. AMBINDER: The way I'd like to have is the way  
11 that I would tell the Court is we think is typically the way  
12 it's done. We engage in pre-cert discovery on paper and  
13 then the class representatives bring a motion. That's how  
14 it's typically done. We're expanding this now into  
15 something that we respectfully submit shouldn't be. There  
16 shouldn't be an opportunity to reach out to perhaps over a  
17 hundred people to get involved in issues of commonality/  
18 typicality.

19 Your Honor may not recall. This type of case  
20 already settled as a class action in California.

21 THE COURT: I do recall.

22 MR. AMBINDER: The court in California found all  
23 the elements of certification existed on a class that I  
24 think was far more expansive than what we're going to be  
25 moving for. So we just do not understand, and your Honor

1 will rule as you see fit, why the defendants should be  
2 permitted to take discovery against what I would call for  
3 the purposes of the 23 motion on the issues of 23 only,  
4 discovery from putative class members essentially. And the  
5 FLSA opt-ins are FLSA opt-ins. They're not taking discovery  
6 against someone who worked five and a half years ago.  
7 There's not going to be any of that.

8           So I don't understand why they're taking  
9 discovery, unless of course we put in a supporting  
10 declaration. That's different. Then we have to produce  
11 them to respond to discovery. But we don't understand why  
12 they should be given the opportunity to take discovery from  
13 FLSA opt-ins who work in New York.

14           THE COURT: In the typical class certification  
15 motion, there is no FLSA precursor.

16           MR. VON LOWENFELDT: We would then do it by  
17 deposition. We would seek permission --

18           THE COURT: Of the named plaintiffs. Are you  
19 going go out and start identifying putatives and proposing  
20 them at random?

21           MR. VON LOWENFELDT: The rules do allow us to ask  
22 for that. And I have to say, in the pre-Walmart world,  
23 there was a big distinction between merits discovery and  
24 class certification discovery. In the post-Walmart world,  
25 that's not clear any longer. So we don't see the big

1 distinction we're talking about.

2 I would also point out that to the extent we ask  
3 anyone discovery at this time, we don't get to ask the same  
4 discovery of the same person again later. So with respect  
5 to that person, what difference does it make to them whether  
6 they get deposed or they get a questionnaire --

7 THE COURT: You're assuming you're going to lose  
8 your motion.

9 MR. VON LOWENFELDT: No, I'm not assuming I'm  
10 going to lose my motion, not at all. What I'm saying is,  
11 the possibility of having the deposition -- you're right, it  
12 would actually benefit everybody if we just had the motion  
13 and won and then --

14 THE COURT: Here's my proposal: We have three  
15 groups. We don't have as huge a population as I thought. I  
16 think we pick 60 and send them the questionnaires. You get  
17 the questionnaire results and you decide if you need  
18 depositions or not after you get --

19 MR. VON LOWENFELDT: 60 from New York.

20 MR. AMBINDER: 60 from New York.

21 THE COURT: 60 from New York to get these  
22 questionnaires.

23 MR. AMBINDER: Why not nationwide?

24 THE COURT: I'm sorry, what? Why not nationwide?

25 MR. AMBINDER: I thought the discovery we were

1 talking about in these letters was nationwide discovery --

2 THE COURT: But you just said we should untangle  
3 the --

4 MR. AMBINDER: I'm not stopping the defendants  
5 from taking nationwide discovery. We just propose that it  
6 should be limited to 60 people. That's all we've ever said.  
7 We never, never dreamed it was going to be 60 people from  
8 New York. How does that have anything to do with their  
9 potential motion to decertify nationwide? Their whole  
10 letter talks about nationwide issues.

11 THE COURT: We're talking about Rule 23 class  
12 certification now.

13 MR. AMBINDER: We never offered 60 from New York  
14 for certification.

15 THE COURT: I'm not saying what you offered. They  
16 want to send this to everybody, right?

17 MR. AMBINDER: Around the country.

18 THE COURT: Yes, everybody.

19 MR. AMBINDER: Yes.

20 THE COURT: I'm saying they shouldn't send it to  
21 everybody in connection with class certification. I think  
22 if they got a population of 60, it would be more than  
23 adequate to demonstrate the lack of commonality. How are  
24 they hurt -- how are you hurt if those 60 have to fill it  
25 out now and it's in the bank for the decert motion?

1 MR. AMBINDER: They're all from New York.

2 THE COURT: Yeah. And they depose your named  
3 plaintiffs and who you put in declarations from, or if they  
4 get these back and they're so ambiguous, we deal with an  
5 application for depositions beyond the scope of what you're  
6 proposing at that point.

7 MR. AMBINDER: So then I take it then that if  
8 we're getting discovery -- if we're producing discovery for  
9 60 of these opt-ins, we will get, and we haven't addressed  
10 it yet, discovery from the defendants, all the discovery  
11 from the custodians that we seek in our letter, that they're  
12 prepared --

13 THE COURT: For those 60.

14 MR. AMBINDER: For those 60. Well, if your Honor  
15 has ruled it's 60, we have to deal with 60.

16 THE COURT: Well, I think with three groups, at  
17 least 20 per group makes sense, to get a sense of whether  
18 there's so much variety in their particular circumstances  
19 that it's inappropriate to certify a class, or whether  
20 there's such commonality. Look, it may be that these come  
21 back in a way that really helps you.

22 MR. AMBINDER: Your Honor, I have issues with your  
23 Honor's ruling, especially since many of these people worked  
24 for periods of time when they were desperate for an initial  
25 job. It may not have lasted very long. They may have de

1 minimis claims, and it's hard to say that someone is going  
2 to sit down for an hour and fill this out, who may have a  
3 claim --

4 THE COURT: But they've opted in.

5 MR. AMBINDER: But they're not -- but they might  
6 want to avail themselves of the Rule 23 as well. We're  
7 taking discovery from opt-ins on a Rule 23 motion for those  
8 who haven't opted in, who may have worked five years ago,  
9 when things were different for all I know.

10 THE COURT: Well, we're going to have to agree  
11 that any differences are not going to be the subject of the  
12 motion practice, right? In other words, if you're going to  
13 target these -- this group for questionnaires to try to  
14 establish a degree of variety, don't come back and tell me  
15 the questionnaires are irrelevant now that they all look the  
16 same.

17 MR. VON LOWENFELDT: We wouldn't say they're  
18 irrelevant, your Honor. I do think that your Honor was  
19 correct initially that there will be manager testimony as  
20 well and other observational testimony. I mean, this isn't  
21 a random sample of the New York agents. It's not  
22 statistically significant, even if we do all 144, because  
23 these are people who have self-selected for the lawsuit.

24 THE COURT: Sure.

25 MR. VON LOWENFELDT: So just by that act, we're

1 not getting a statistical sample of New York. So we may  
2 have -- we may have other evidence that speaks to --

3 THE COURT: Other evidence or evidence that  
4 discounts the relevance of this because it's from the wrong  
5 time period.

6 MR. VON LOWENFELDT: Right, correct.

7 THE COURT: Yes?

8 MR. VON LOWENFELDT: Yes.

9 THE COURT: Well then, why should I put these 60  
10 people through it, if it's not from the right time period?

11 MR. VON LOWENFELDT: Well, it's not that it's not  
12 from the right time period, it's not from the entire time  
13 period. It is from the right time period, it's just from  
14 the most recent --

15 THE COURT: Well, did the practices change? Are  
16 you going to put in management affidavits that there were  
17 different practices during years 4, 5, 6? If you're going  
18 to do that, I'm not going to put these 60 people through  
19 this.

20 MR. VON LOWENFELDT: I am not presently aware of  
21 any corporate practices that changed in those years.

22 THE COURT: All right.

23 MR. VON LOWENFELDT: I do not leave out the  
24 possibility that there was a rogue manager in one branch who  
25 was acting badly for a certain period of time.

1 THE COURT: We're not talking about that.

2 MR. VON LOWENFELDT: Okay. No, there are no  
3 corporate practice differences that would be relevant.

4 THE COURT: And you'll so stipulate before the  
5 questionnaires go out.

6 MR. VON LOWENFELDT: Well, we've given them the  
7 practices for the entire time period, and they're the same.

8 THE COURT: So you'll stipulate -- then it's an  
9 easy stipulation.

10 MR. VON LOWENFELDT: Yes. I want to confirm with  
11 the client to make sure I'm being accurate.

12 THE COURT: Sure, sure.

13 MR. VON LOWENFELDT: But yes.

14 THE COURT: Sure, that these responses would be  
15 just as -- would be no more or less informative if they were  
16 from a group of people who were in the class period rather  
17 than subsequent to it.

18 MR. VON LOWENFELDT: If I send out the  
19 questionnaire and you give me 60 New York people and I don't  
20 like the answers, I'm not going to argue they can't use it.

21 THE COURT: That's not my point.

22 MR. VON LOWENFELDT: Okay.

23 THE COURT: But I don't want you to argue against  
24 it after you sought it --

25 MR. VON LOWENFELDT: Right.

1 THE COURT: -- by saying, they're really not that  
2 helpful to the analysis because our practices during years  
3 4, 5 and 6 were different than our practices during years 1,  
4 2, 3.

5 MR. VON LOWENFELDT: Okay. I'm not aware of any  
6 such argument.

7 THE COURT: Okay.

8 MR. VON LOWENFELDT: But I'll confirm that.

9 THE COURT: So before you send the questionnaires  
10 out, you can confirm that and stipulate that they would be  
11 just as probative as if they came from the proposed class  
12 period. And then we'll have a data -- an empirical basis  
13 upon which to try to resolve this factual dispute.

14 MR. AMBINDER: If I can just seek clarification  
15 and ask for -- so this means now we're going to get full-  
16 blown discovery for all the number, whatever it's going to  
17 be, plus we're going to take the depositions of all these  
18 managers, which we'll do -- we're prepared to do all that.  
19 Can I throw just a tiny bit of a wrinkle in this? Can we  
20 make it 20 and 20 (ui).

21 THE COURT: I don't know what you mean by 20 and  
22 20.

23 MR. AMBINDER: Because whether you're 12<sup>th</sup> or  
24 you're 20<sup>th</sup>, you didn't get paid. You didn't have a license  
25 and it's their -- it's defendants' position that you didn't

1 even work, you were there just to get your license. Can we  
2 make it 20 pre-employment and 20 post-employment?

3 MR. VON LOWENFELDT: That doesn't add up to 60 but  
4 I would be happy to split the 60 between the two groups. I  
5 think that's logical. I would note, though, that everybody  
6 who's in the second group was at one time in the first  
7 group. So it's not as though --

8 THE COURT: Well, that's a good point for the 20  
9 and 20, isn't it, because you're going to be getting double  
10 data from half of them.

11 MR. VON LOWENFELDT: Well, we'll get data from  
12 agents who completed it successfully and moved on and agents  
13 who --

14 THE COURT: But my point is that some people will  
15 qualify in both groups. Everybody is going to -- everybody  
16 in the second -- in the post-employment group will qualify  
17 to both, and your questionnaire asks them about their first  
18 experience as well as their second.

19 MR. VON LOWENFELDT: That's correct.

20 THE COURT: So he's right that 40 should be enough  
21 because you'll in essence be getting -- even if half are  
22 post-employment, if 20 are post-employment, you'll be  
23 getting 40 plus 20 in terms of information.

24 MR. VON LOWENFELDT: I'll be getting on the 40  
25 pre-employment but I'll only be getting 20 on the post-

1 employment, and there are eight New York offices. So maybe  
2 I'll get lucky --

3 THE COURT: I was envisioning 20/20 in the two  
4 different pre-employment groups and 20 in the post-  
5 employment. Now I'm realizing that --

6 MR. VON LOWENFELDT: He's asking for 40.

7 THE COURT: Yes, that if we give you 40, you'll be  
8 getting the equivalent of 20/20/20, because half of those 40  
9 are going to be able to answer two sets of questions. So 40  
10 it is.

11 Now, are we going to pick them randomly or -- you  
12 each want to pick some of them. So with 40, you could each  
13 pick 10 and pick 20 at random or you could pick 40 at  
14 random.

15 MR. VON LOWENFELDT: Well, they have access to  
16 people who they're going to submit declarations from, so why  
17 should they get to pick any of them?

18 THE COURT: Well, we've already said anybody who  
19 submits a declaration --

20 MR. VON LOWENFELDT: No, but what --

21 THE COURT: -- has to --

22 MR. VON LOWENFELDT: Right, but what I'm saying  
23 is, they get to make that pick initially. Why shouldn't I  
24 get to pick all 40?

25 MR. AMBINDER: Wait --

1 MR. VON LOWENFELDT: If it's 40.

2 MR. AMBINDER: We see it just the opposite.  
3 They're our clients and it's a motion for certification. I  
4 don't know why we shouldn't be able to pick all 40. They're  
5 our clients. As I said, normally, I would aggressively --

6 THE COURT: Random.

7 MR. AMBINDER: All of them?

8 THE COURT: Yeah. If you can't agree, we'll do it  
9 random. If you work out an agreement, that's fine, too.

10 MS. MILLER: What about 10, 10 and 20 random, or  
11 something like that?

12 MR. VON LOWENFELDT: The problem I have with  
13 random is there are eight offices and I want to make sure we  
14 capture all the offices. They're not equal in size.

15 THE COURT: You have a manager available from each  
16 office, too, right? If you want to do 10, 10 and 20, I have  
17 no problem, but I'm not giving one side the ability to  
18 control it because then we don't accomplish the result.  
19 Because if you pick them, Mr. Ambinder, he's going to say,  
20 of course, they're all common, he screened 100 to come up  
21 with these 40.

22 MR. AMBINDER: Let's say of the 40, we only get 29  
23 in. This Court decides it's not going to certify our class,  
24 which will affect people who worked five years ago, who  
25 weren't even subject to discovery. I'm just not following

1 why you --

2 THE COURT: Why am I doing it? Because you've got  
3 a factual dispute that drives the outcome of the motion, and  
4 I don't want the Court to be left with two affidavits from  
5 the plaintiff and five affidavits from the defendant and no  
6 way to resolve the factual dispute, and then to first have  
7 discovery on the questions of fact that are raised by the  
8 class certification motion thereafter.

9 I'm trying to create a basis of empirical data  
10 that has some element of randomness, so that a court can  
11 rely upon it to say, this data was manipulated by either  
12 data. This data tells me either that these people never  
13 went into the office or one spent 60 hours in the office,  
14 one spent 30 hours in the office, one never went to the  
15 office. We've got people in each group. They're too  
16 different or everybody is telling me the same story. That's  
17 why. Otherwise, how does a court decide this motion?

18 MR. AMBINDER: The same way they decide most 23  
19 motions.

20 THE COURT: Most 23 motions don't involve disputes  
21 of fact about what the employees did. They involve  
22 arguments about whether or not the minor details that  
23 everybody acknowledges are sufficient to overcome the  
24 commonality and typicality problems, I think.

25 MR. AMBINDER: Well, I'm (ui).

1 THE COURT: Okay.

2 MS. MILLER: Your Honor, if it's okay, the  
3 10/10/20, I think.

4 MR. VON LOWENFELDT: We'll agree to each pick 10  
5 and have 20 random.

6 THE COURT: Great. Let's move on. We'll have --  
7 maybe we should be on a panel together someday and we'll  
8 have a philosophical debate.

9 All right. So we talked about the scope of the  
10 questionnaire, we talked about who's going to answer it.  
11 The deponents will be those who the plaintiffs are going to  
12 put in declarations for. And of course, the named  
13 representatives, and of course, anybody that the defendants  
14 are going to be put in. Named representatives -- the  
15 defendants can come back if the questionnaires are filled  
16 out with, you know, pictures of trees and houses instead of  
17 answers and say, Judge, we can't -- I'm being a little  
18 facetious now but --

19 MR. VON LOWENFELDT: What I would suggest, your  
20 Honor, is that there may be other -- we may get, for  
21 example, a questionnaire that's a real outlier questionnaire  
22 that we want to ask that person how is it that they could be  
23 doing what they say, and we might want to come in and ask  
24 the Court for some depositions --

25 THE COURT: Well, you can always come in and ask,

1 and we'll see where we go.

2 MS. MILLER: Just to clarify, did you also say  
3 that the defendants are letting us know who they're putting  
4 declarations in, in opposition, so we can depose --

5 THE COURT: Well, if they don't let you know in  
6 advance, I'll stay your reply until after you get their  
7 depositions, but I would hope they would tell you in  
8 advance.

9 MR. VON LOWENFELDT: I mean, it's going to depend  
10 on the time frame we set. If they really are filing in a  
11 couple of days here, we're going to want a long period of  
12 time for our opposition, and I'd imagine we can build enough  
13 time for them to depose our people before we file that  
14 opposition, so that the reply can be --

15 THE COURT: Yeah.

16 MR. VON LOWENFELDT: But whatever they want for  
17 the reply. I don't want to jam anyone up on their replies.

18 THE COURT: So let's do the motion schedule last.  
19 Let's talk about the ESI for a minute. Why wouldn't the ESI  
20 -- well, let me withdraw that. We're agreed that the ESI  
21 for the people who are answering the questionnaires is  
22 appropriate.

23 MR. VON LOWENFELDT: (Ui) for them, yes.

24 THE COURT: Okay. The plaintiffs, I think, are  
25 asking for two additional categories of information.

1 They're asking for e-mails from -- they're asking from e-  
2 mails from certain supervisor/managers and they're also  
3 asking for data other than e-mails, which is sort of  
4 interesting.

5 MR. VON LOWENFELDT: I don't believe we have a  
6 dispute with the data other than -- to the extent we have  
7 things like log-on information, call list information as to  
8 the named plaintiffs and I guess these other people, we'll  
9 provide that. I was surprised to see that in a letter  
10 because I thought we had conveyed that. It's just been a  
11 process of figuring out what it is. But we will give them  
12 that information. The dispute is over the manager e-mails  
13 that did not go to or from the agents themselves.

14 THE COURT: Well, let's start there, because my  
15 first thought was, the agents may no longer have access to  
16 e-mails they receive from managers. So you're prepared to  
17 search the managers' boxes for e-mails with the agents.

18 MR. VON LOWENFELDT: I don't know why that  
19 wouldn't be in the agents' e-mail box, which we still have.

20 THE COURT: Oh, you still have -- this is e-mail  
21 boxes that you still have --

22 MR. VON LOWENFELDT: Yes.

23 THE COURT: -- that nothing has been deleted from,  
24 or if it's been deleted, it's been restored.

25 MR. VON LOWENFELDT: I can't speak to what the

1 agents were doing in terms of their own personal e-mail  
2 retention but, otherwise, it should be there. So if the  
3 manager sent -- if Mr. Kennedy received an e-mail from his  
4 manager --

5 THE COURT: What about management e-mails that are  
6 -- of which the agents are a subject?

7 MR. VON LOWENFELDT: I guess our position --

8 THE COURT: Balled out Jim today because he didn't  
9 show up at 10:00, we'll see if he improves.

10 MR. VON LOWENFELDT: I guess our position on that  
11 is that it's a need in a haystack search, which really at  
12 the end of the day, no one or a hundred e-mails is going to  
13 tell us --

14 THE COURT: Why can't you put in the surnames of  
15 the agents to find out? Why is that needle in a haystack?  
16 We're doing word searches, right? I mean, if there's a  
17 Smith or a Jones in there and you've got 80 of them working  
18 for AXA, we'll take that person out. But if name is von  
19 Lowenfeldt, how many hits are you going to get?

20 MR. VON LOWENFELDT: About six. But, your Honor,  
21 there are e-mails that go out to all the agents all the  
22 time. All those are going to get swept up, even though  
23 they're probably already in the e-mail box. My point is not  
24 so much that it's hard to find their name in the e-mail. My  
25 point is that 99.99% of those e-mails will be totally

1 irrelevant to the facts in dispute in this case.

2           What we were proposing with respect to this was  
3 not that they not get it. What are proposal was -- we'll  
4 give you what the agents got and then if you can find e-  
5 mails in there that you think are important to your case and  
6 that actually justify the expense of going forward, show us  
7 and we'll talk about it and if we can't agree, then we'll  
8 come to the Court and figure out what to do next.

9           But let's -- rather than reflexively assuming that  
10 the manager e-mail about them will somehow be relevant to  
11 what is fundamentally an outside salesperson question for  
12 the employees -- right? An e-mail is not going to -- no one  
13 e-mail can possibly tell us what they're doing at any given  
14 time. We think they should have to have some more of a  
15 showing, based on an actual e-mail itself, to justify the  
16 enormous -- millions of e-mails that have to be gone  
17 through, searching names --

18           And you know, the proposal they sent us is not  
19 just names. It's got a lot of common terms in it that would  
20 be in thousands and thousands of e-mail. It's not that we  
21 don't want to give them the discovery. It's expensive, it  
22 take a long time, and we would like to see some bang for the  
23 buck before we go down that road, unless of course they're  
24 going to pay for the whole thing, which I know that they  
25 don't want to.

1           THE COURT: But there are different ways of  
2 testing bang for the buck, like finding a finite time  
3 period, three or four of the managers, and run them with  
4 respect to ten of the agents for six months, and see what we  
5 get that way.

6           MR. VON LOWENFELDT: I'm happy to meet and confer  
7 with them on a more narrow -- actually, Adrian. I'll be  
8 happy to meet and confer with them on the technical stuff.

9           MR. AMBINDER: Yeah, okay.

10          MR. VON LOWENFELDT: It's his job. But I think  
11 that if we are talking about -- our idea was sample, decide  
12 whether a larger search makes sense. I think if the Court  
13 thinks that's a sensible approach, we can certainly discuss  
14 what a useful sample is, a meaningful sample.

15          We're not trying to deprive them of any  
16 information or, frankly, us, because I think it's more  
17 likely the manager says, I haven't seen Mr. Kyle in three  
18 weeks, wonder if he's ever coming back to work. It seems  
19 highly likely to me we're going to find that e-mail and not  
20 an e-mail that helps them. So it's not as though I'm not  
21 also interested in this. It's just it's not free or  
22 immediate.

23          MR. AMBINDER: (Ui) absolutely represent that they  
24 did not work for us, especially pre-employment, they were  
25 just studying for a test, then we'd better back it up. And

1 we think there's going to be a lot out there showing that  
2 these people were working. I think you're going to --

3 THE COURT: That they themselves weren't party to.

4 MS. MILLER: If I may, I'm sorry.

5 MR. AMBINDER: Yeah.

6 MS. MILLER: One of the factors that is  
7 significant with the ESI is that in the pre-employment  
8 period, they didn't all have that. So sometimes there were  
9 computers that they used that were -- there were sort of  
10 stations. So not everyone had their own computer all the  
11 time.

12 There were oftentimes people using the same  
13 computer while they -- you know, before they had the later  
14 period. So a lot of these -- an individual might not have  
15 everything their own but there may be e-mails going back and  
16 forth between managers saying, Bob didn't come to class  
17 today or Bob didn't call as many people as necessary today,  
18 but Bob doesn't have an e-mail account.

19 THE COURT: So you're with me on limiting the  
20 search terms to the names of the agents.

21 MR. AMBINDER: It has to be, because if they're  
22 saying that these individuals never made calls and never had  
23 anything to do with sales, all we need is an e-mail that  
24 shows that Joe Intern asked Sam the Salesperson to help him  
25 out with a deal. All of a sudden, all their representations

1 on the record go out the window. We can now show that they  
2 did do work.

3 THE COURT: So you're agreeing with me. Good.

4 MS. MILLER: Your Honor, I'm sorry, if I may. I  
5 think at the minimum, definitely the names are the key  
6 terms.

7 THE COURT: Right.

8 MS. MILLER: I think there's a few others that  
9 might apply to -- we can try to work on these. We have not  
10 actually sat and gone through the list of search terms and  
11 how many hits they might garner. But there are certain  
12 terms, such as maybe -- well, we can try to work on this.  
13 There are certain ones that might be very relevant to  
14 requirements.

15 THE COURT: I'm only going to order the names and  
16 I'm going to direct that you confer on a test time period,  
17 provided that by doing a test, the defendants are not going  
18 to come back with the argument that says it's more  
19 expensive, we should have done it all at the same time.

20 MR. VON LOWENFELDT: The other thing that I just  
21 heard is that they're focused on the pre-contract period,  
22 which is a shorter time period than the three years before  
23 they're employed.

24 MS. MILLER: Just as a example.

25 MR. VON LOWENFELDT: But I think that e-mail

1 searches about the pre-contract period to see what they were  
2 doing -- and now I heard an explanation. In the pre-  
3 contract period, they're talking about work and we say  
4 they're not working. I get that. But in the post-contract  
5 period, if they're talking about work, so what? They're  
6 employees. We know they're working.

7           So I think now, we're talking about a much  
8 narrower time frame to sample from, and even if we did the  
9 whole time frame eventually based on the sample, the pre-  
10 contract time frame is short compared to the employee time  
11 frame, and they're absolutely right. The pre-contract  
12 people didn't have AXA e-mail before they were licensed.  
13 Mr. Marcus, for example, has no AXA e-mail. He was not  
14 working. So I understand the different need there.

15           So earlier time period, do a sample, narrow the  
16 search terms. We can work that out.

17           MR. AMBINDER: Well, we'll try, but I'm not  
18 confident we will. But we'll certainly try, Judge.

19           MS. MILLER: If we can try to at least get the  
20 names during the entire period, because I don't think that  
21 will pick up as many. And then we can maybe try to work on  
22 a shorter time period for some of the opt-in -- like the  
23 named plaintiffs, I think we'd be less willing to negotiate  
24 on. But perhaps for the opt-ins, we can then work on more  
25 of a finite time period.

1           THE COURT: Okay, all right. We'll set a schedule  
2 for -- somebody is keeping a list of everything that has to  
3 be done, right? So we'll set a schedule when we're done,  
4 although I'm not sure how much more there is.

5           I think the only things that are left from the  
6 letters are coming up with a briefing schedule and dealing  
7 with late filed consents. Am I missing issues?

8           MR. AMBINDER: I think that's it.

9           MR. SAWYER: Your Honor, may I clarify something?

10          THE COURT: Clarification would be welcome.

11          MR. SAWYER: I understand that you're going to  
12 order that we run the names of the named plaintiffs on  
13 managers e-mails, all the custodians that they've asked for.  
14 But we're also -- we've been ordered to confer as to the  
15 time period. I didn't understand your order to mean that we  
16 are now ordered to run those names on those custodians for  
17 the entire time period those period those people were  
18 affiliated with AXA.

19          THE COURT: I thought for the named plaintiffs,  
20 there was not a dispute about running it for the entire time  
21 period. Am I missing something?

22          MS. MILLER: That's what I thought.

23          MR. VON LOWENFELDT: Yes. For the named  
24 plaintiffs, their e-mail boxes, to the extent they have  
25 them, we're going to give them.

1 MR. SAWYER: Right.

2 MR. VON LOWENFELDT: So in their e-mail box. But  
3 manager e-mail that has their name in it, I guess it depends  
4 on what you mean by in the e-mail. In the subject of the e-  
5 mail?

6 MS. MILLER: Anywhere.

7 MR. AMBINDER: Anywhere.

8 THE COURT: Or in the body.

9 MS. MILLER: These people only worked -- we're  
10 only talking about a three-year --

11 MR. VON LOWENFELDT: That's what I mean, the body.  
12 If you're talking about the addresses, then any group e-mail  
13 that went to everybody is going to get pulled by that  
14 search.

15 THE COURT: Isn't there a way to create a search  
16 algorithm that says, this guy's name but not as part of the  
17 entire group of associates?

18 MS. MILLER: Well, your Honor, if the name is in  
19 with a group of other people, that e-mail would have been  
20 received by that person, so it would already be being  
21 produced by them, because that would have been an e-mail  
22 that they would have received.

23 THE COURT: Unless they're in the pre-employment  
24 period and didn't have that --

25 MS. MILLER: Right.

1           THE COURT: Were there mass e-mails to the folks  
2 who were in the pre-employment period?

3           MS. MILLER: Then they wouldn't have received the  
4 e-mail if they didn't have an e-mail address.

5           THE COURT: Right. That's my point. So then it  
6 should be discovered.

7           MR. AMBINDER: Well, yeah. I mean, to us, it goes  
8 to those elements of 23. If everybody had to work on  
9 Saturday and you see there are 150 names on that e-mail and  
10 they all have to work on Saturday post-employment, I'm going  
11 to use that in my motion.

12           MR. VON LOWENFELDT: I think what's important,  
13 your Honor, is that if we can (ui) coming out of that e-mail  
14 search.

15           THE COURT: Well, let's do this: With the named  
16 plaintiffs, let's do their entire pre-employment period.  
17 And then at least after they're employed, to the extent they  
18 are, they will have their own e-mail boxes.

19           MS. MILLER: Yes.

20           THE COURT: Okay?

21           MS. MILLER: Could we also request the managers,  
22 just for the three named plaintiffs, when their name is  
23 mentioned in their post-employment --

24           THE COURT: Well, that's what we were just talking  
25 about. How long is their post-employment period?

1 MS. MILLER: One individual I believe is two or  
2 three years, the longest.

3 THE COURT: So why don't we take a six-month  
4 snapshot, and if you find anything relevant in there, they  
5 will expand it, as long as they don't come back and argue to  
6 us it's more expensive to slice it up that way.

7 MS. MILLER: So the entire pre-employment period  
8 and then a six-month post-employment period.

9 THE COURT: Six-month, right. And then you'll  
10 work something -- I mean, look, your technically  
11 sophisticated partner here, Mr. Sawyer -- I don't know what  
12 we're really talking about here, whether if there are  
13 certain time periods where there are backup tapes that have  
14 to be restored at great expense, whether there are different  
15 software programs that are more or less amenable to search  
16 protocols at different time frames. But just be open and  
17 candid with the plaintiffs about what the problems are, and  
18 I suspect they will work with you.

19 Again, though, if we're going to limit time frames  
20 ultimately, I would expect a stipulation from the  
21 defendants, if the plaintiffs seek it, that the e-mails that  
22 were produced for this time period are representative of the  
23 frequency, nature and scope of e-mails that would have been  
24 uncovered if the entire time period were searched. If you  
25 won't agree to that, then it suggests that I have to give

1    them the entire time period.

2                   (Attorney microphone has stopped working.)

3           THE COURT:   Well, when was the settlement?

4           MR. AMBINDER:   2008.

5           THE COURT:   And what's the three-year period we're  
6   looking at?

7           MR. AMBINDER:   2008 to 2011.

8           THE COURT:   That can't be right.   We're looking at  
9   years 4, 5, 6 for class certification, right?

10          MR. AMBINDER:   2009, I'm sorry.

11          THE COURT:   2008, 2009?

12          MR. AMBINDER:   (Ui).

13          MR. VON LOWENFELDT:   (Ui).

14          THE COURT:   But haven't you had the opportunity to  
15   serve interrogatories and document demands about whether  
16   there were any policy changes during the relevant time  
17   periods?

18          MR. AMBINDER:   Pre-class certification (ui).

19          THE COURT:   Well, I said interrogatories or  
20   document demands.   But clearly, they're going to be putting  
21   in managers' affidavits.   If you want to take discovery on  
22   that and make expanded discovery demands based upon the  
23   answers you receive, I don't really have a problem with  
24   that.   But you're the ones -- right now, the topic that  
25   we've been talking about is your demand for e-mails.   If

1 you're saying that the e-mails are going to be irrelevant  
2 and you don't want them because they may have changed  
3 their --

4 MR. AMBINDER: (Ui).

5 THE COURT: Yeah.

6 MR. AMBINDER: Of course I do. But --

7 THE COURT: You're wondering about sampling a  
8 limited time period.

9 MR. AMBINDER: (Ui) 23 for a three-year period.

10 THE COURT: 23 for a three-year --

11 MR. AMBINDER: If we're only going --

12 THE COURT: Are you talking about Rule 23 or 23  
13 people? I'm lost right now.

14 MR. AMBINDER: The Rule 23 motion --

15 THE COURT: Yeah.

16 MR. AMBINDER: -- involves people who worked  
17 essentially over the last four years, three and a half, four  
18 years. (Ui) five or six years. Nobody (ui).

19 THE COURT: Whose e-mail are we looking at here?  
20 I thought we were looking at the named representatives of  
21 the putative class, who I presume were in the pre-employment  
22 and post-employment category during years 4, 5, 6. Am I  
23 wrong?

24 MR. AMBINDER: I don't know. (Ui) sample people.

25 THE COURT: Ah.

1 MR. AMBINDER: Aha! Now you know what I'm talking  
2 about. If you want to do a sampling, it's going to be a  
3 sampling (ui) and that's everybody. That's why in my  
4 letter, I talked about how this can get stupid after a  
5 while, because not one --

6 THE COURT: Well, let's do their e-mail boxes and  
7 see what we have. How many of them were -- let's do their  
8 e-mail boxes and run their names during the periods when  
9 they were in pre-employment status. That seems to be ample  
10 with respect to those 60.

11 MS. MILLER: 40.

12 THE COURT: 40.

13 MR. AMBINDER: 40, my apologies.

14 MS. MILLER: The only problem is, if we just run  
15 their names during the pre-employment period, it will only  
16 pick up -- because they don't yet have e-mail boxes, it will  
17 only pick up the random communications with the third  
18 parties, managers, et cetera.

19 THE COURT: What proposal would you have other  
20 than that?

21 MS. MILLER: (Ui) from the employment period.

22 THE COURT: I said we'll get for those 40, instead  
23 of -- all right, let me start again. For those 40, you'll  
24 get their e-mail boxes, and for the pre-employment period  
25 for those 40, the managers who interacted with them, their

1 e-mails will be searched for their names.

2 MS. MILLER: Thank you, your Honor. I apologize.

3 THE COURT: Okay? That's what I was trying to  
4 say. Maybe it didn't come out right.

5 MR. SAWYER: Your Honor (ui). Of those  
6 custodians, not every -- not every one of those custodians  
7 interacted with (ui).

8 THE COURT: Right. You're going to have to  
9 decide, Mr. Sawyer, whether it's cheaper to run the entire  
10 database once with all of the appropriate search terms, or  
11 whether the algorithms can be worked out so that only the  
12 relevant parties that knew each other searched for each  
13 other's names.

14 MR. SAWYER: Right.

15 MR. VON LOWENFELDT: (Ui) so we don't want to do  
16 Michael and John --

17 THE COURT: Of course. They don't want it any  
18 more than you do.

19 MR. AMBINDER: Thanks for clarifying that.

20 THE COURT: No, thanks for raising the ambiguity  
21 so that I had the opportunity to do it.

22 So now we're left with late opt-ins and briefing  
23 schedules, right?

24 MS. MILLER: (Ui) opt-in discovery (ui).

25 MR. AMBINDER: (Ui).

1 MS. MILLER: They requested to serve the  
2 interrogatories on all 700 people (ui).

3 THE COURT: If we're only going to do the Rule 23  
4 motion first, then they clearly don't need that now. I  
5 mean, if you want to invite a -- if the plaintiffs want the  
6 FLSA discovery to go forward to the point of decertification  
7 motion practice and get that rolling while the class is  
8 happening, I'm not averse to that.

9 MS. MILLER: (Ui) just address (ui).

10 THE COURT: Hopefully, we'll learn enough from  
11 this process that we'll be better educated when we confront  
12 the next one.

13 MR. AMBINDER: The late opt-ins.

14 THE COURT: Late opt-ins. I mean, I thought the  
15 defendants' letter was pretty reasonable. I don't know if  
16 you had a chance to think about it. They said, let's see  
17 what the reasons are. Let's see whether the post-marking  
18 issue gets rid of some of it and let's see if the others  
19 have some kind of justification. What's your reaction to  
20 that?

21 MR. AMBINDER: That's fine.

22 THE COURT: Okay.

23 MR. AMBINDER: (Ui).

24 MR. VON LOWENFELDT: To be clear, I wasn't  
25 suggesting (ui).

1           THE COURT: Oh, okay, that's fine. I'll share an  
2 anecdote with you. I had a really -- do any of you have a  
3 train to catch? I don't want to keep you folks here.

4           MR. VON LOWENFELDT: I have a train to catch, your  
5 Honor, but (ui).

6           THE COURT: Sorry about that.

7           MR. VON LOWENFELDT: I would ask if it's possible  
8 (ui).

9           THE COURT: If you remind me, it's definitely  
10 possible.

11          MR. VON LOWENFELDT: (Ui) late afternoon (ui).

12          THE COURT: Of course not. I would hope I don't  
13 give off that vibe.

14          But I had an FLSA case settled with a blow (ph)  
15 provision, right? And there was a deadline for the  
16 defendant to invoke the blow provision right. Missed it by  
17 two days. He argued, ultimately to the point of persuading  
18 me, we let people opt in late all the time under 216(b).

19 How can you prevent me, absent some showing of prejudice,  
20 from opting out 48 hours later than I should have? It was  
21 law office error. It wasn't the client being manipulative.

22          MR. AMBINDER: (Ui).

23          THE COURT: So I would expect the same -- I don't  
24 want to hear about a guy who got it out a day or two late  
25 because he calendared it and he got busy that day and he got

1 up the next day. But there does have to be -- after some  
2 period of leeway, whether it's two weeks or thirty days,  
3 there has to be an end point, and I'm sure you'll work  
4 together and find it, okay?

5 MR. AMBINDER: Thank you.

6 THE COURT: Briefing schedule.

7 MR. VON LOWENFELDT: May I suggest, your Honor  
8 (ui). (Ui) but I think we're months away from (ui)  
9 opposition (ui).

10 THE COURT: Well, I want the discovery to move  
11 along. I mean, we don't have a lot of discovery to do if  
12 it's in paper, right? We can randomly generate the 20 and  
13 identify the other two groups of 10 within a week. We can  
14 narrow down the questionnaire in a couple of weeks and get  
15 it in the mail to those people. We can give them thirty  
16 days to fill it out and send it back. So we're only sixty  
17 days down the road.

18 The ESI search and privilege review, I mean, I  
19 don't expect there's going to be a lot of privilege --

20 MR. VON LOWENFELDT: That can take some time (ui).  
21 I hate to put them in a position of putting them on a  
22 schedule that's just not (ui).

23 THE COURT: Well, you know, maybe the e-mail can  
24 be done on a rolling basis. In other words, we talked about  
25 -- well, let me explain what I'm thinking when I say that.

1 We talked about complete e-mail boxes of certain plaintiffs.  
2 Those should be easy to dump and deliver.

3 MR. VON LOWENFELDT: (Ui).

4 THE COURT: They weren't even employees. They  
5 weren't subject to the attorney/client privilege by your  
6 position, right?

7 MR. VON LOWENFELDT: (Ui).

8 THE COURT: So you can turn over the pre-  
9 employment period without any privilege review because they  
10 couldn't have a privilege if they weren't an employee,  
11 right?

12 MR. VON LOWENFELDT: For most of that period, they  
13 don't have e-mail boxes.

14 THE COURT: Ah.

15 MR. VON LOWENFELDT: Like Mr. Marcus (ui). It  
16 would only --

17 THE COURT: Touché. I thought I had you but  
18 touché, all right.

19 MR. VON LOWENFELDT: I'm not resisting it. I'm  
20 just saying I don't think this is (ui).

21 THE COURT: Let me rephrase it then. The ESI  
22 people's schedule should not impede prompt delivery where  
23 complete e-mail boxes are forthcoming. That should be an  
24 easy step. So the privilege review of that aspect should be  
25 able to start quickly, because we're not screening the e-

1 mails or running bouillon (ph) searches because they're the  
2 plaintiffs' e-mails.

3           With respect to managers' e-mails, I understand  
4 that that's a more sophisticated, delicate analysis, and  
5 maybe that comes in a second wave. But that can be done  
6 while we're waiting, hopefully, for the questionnaire  
7 responses, and we really shouldn't need thirty days to work  
8 out a schedule for these issues and then first start  
9 implementing. We should really -- we're talking about maybe  
10 sixty days of work, except for the managers' e-mails,  
11 potentially.

12           So let's have that case management conference in  
13 two weeks or case management status letter in two weeks,  
14 that tells me whether you've worked it all out and now have  
15 an agreement. Obviously, before they put in their  
16 opposition, they've got to get the questionnaires out and  
17 get responses to them.

18           And they've got to depose the named plaintiffs,  
19 the class reps. Hopefully, you'll be able to find a date by  
20 which you can identify -- I say the defendants -- the  
21 declarants that they will be using, or at least the majority  
22 of them, and we can schedule those depositions within a  
23 short period as well.

24           MR. VON LOWENFELDT: (Ui).

25           THE COURT: Was that a moment of heated zealous

1 advocacy, Mr. Ambinder?

2 MR. AMBINDER: (Ui).

3 THE COURT: Yeah.

4 MR. AMBINDER: (Ui).

5 MR. VON LOWENFELDT: (Ui).

6 THE COURT: Right. For you, it's the discovery  
7 driving the motion until you get within a month or so of  
8 completing it.

9 MR. AMBINDER: We'll take it up.

10 THE COURT: So either way. You can either hold  
11 off on filing -- the only problem is, if you hold off on  
12 filing and it raises something that we haven't discussed,  
13 once you do, they will be back in here looking for a longer  
14 discovery schedule. If you file soon and then two months  
15 later, they come in and they try to move the schedule, that  
16 creates the appearance of a tactical approach rather than a  
17 merits-based one.

18 I didn't mean to deprive you of that remark, if  
19 you'd like me to repeat it.

20 MR. VON LOWENFELDT: I hear you. I'm sorry (ui).

21 THE COURT: And I'm not complaining about the  
22 interruption. I just don't want you to miss anything.

23 All right, I'll get a letter from you in two  
24 weeks, ironing out what we talked about tonight into some  
25 kind of a formal structure. It's been a great privilege to

1 spend my afternoon with all of you.

2 MR. VON LOWENFELDT: Thank you, your Honor.

3 MS. MILLER: Thank you.

4 THE COURT: Bye.

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I certify that the foregoing is a correct transcript  
from the electronic sound recording of the proceedings in  
the above-entitled matter.

A handwritten signature in black ink, appearing to read 'EB', with a long horizontal stroke extending to the right.

ELIZABETH BARRON

March 22, 2013